



NATURAL RESOURCES BOARD
Districts #2&3 Environmental Commission
100 Mineral Street, Suite 305
Springfield, VT 05156-3168

January 14, 2019

Green Mountain Power
c/o Geoffrey Green
2152 Post Road, Rutland, VT 05701
geoffreygreenpcs@gmail.com

**Subject: Jurisdictional Opinion #2-312 Green Mountain Power– Act 250 Permit
Application #2S1350 – Reading, Vermont**

Dear Mr. Green:

I write in response to your request for a Jurisdictional Opinion as provided for in 10 V.S.A. § 6007 (“the request”).

At the outset, I would like to emphasize that jurisdictional determinations are made by the District Coordinator pursuant to 10 V.S.A. §6007. Neither the Applicant nor the District Commission has that authority. My opinion follows.

I. Summary of Opinion

In summary (and for reasons outlined in more detail below), it is my opinion that Act 250 jurisdiction does not attach to the poles specified in Fact #1 below and does not attach to poles specified in Fact #2 below provided that the existing poles will be removed in their entirety and that the new poles will be installed in their stead such that no portion of the existing poles remain.

II. Facts and Documents

1. Poles 86; 5-1(L44); 5-01(L44); 74-1; 74-2; 74-3; 74-4; 74-4-1; 74-4-2 will not be replaced and will be retagged.
2. Poles 36; 45-56; 56A; 57-63; 67; 73; 74; 66(L4); 1(L44); 2(L44); 3(L44); 4(L44); 5(L44) will be replaced in kind and *in situ* with poles that will be no more than 10' taller than the existing poles.

III. Analysis and Conclusion

At the outset, I'll directly respond to your “[r]esponse for information, GMP-Reading, VT” which makes several troubling assertions, among them the following:

At the hearing, it appeared the Commission was challenging Act 250 jurisdiction over the installation of in kind and in place replacement poles. Although I [Mr. Green] tried several times to highlight those areas of the project that were not subject to Act 250 jurisdiction, it was clear the Commission did not want to discuss Act 250 jurisdiction.

Response: Jurisdictional determinations can only be made by a District Coordinator.¹ I have reminded GMP in the past that jurisdictional determinations are not made by the Applicant and I feel obligated to reinforce that point here.² Pursuant to Act 250 Rule 70(B)(3), the District Commission shall be notified if the utility is constructing improvements in an existing corridor and the District Coordinator will decide if a jurisdictional opinion is necessary.

Relevant law

The Natural Resources Board (“NRB”) reconsidered a jurisdictional opinion (“JO”) that assessed facts similar to the ones at issue here. The NRB summarized the relevant law in *GMP, JO 3-188 Reconsideration Decision*, p. 2-3 (2016) which can be summarized as follows: Act 250 Rule 70(B)(1)(C) provides that a substantial change may exist even if a proposed project represents the repair and replacement of component parts. Act 250 Rule 2(C)(7) defines substantial change as any cognizable change to a pre-existing development or subdivision which may result in significant adverse impact with respect to any of the criteria.

Issue

The question that this JO seeks to answer is whether the poles listed in Facts #1 and #2 above are a substantial change requiring an Act 250 permit.

Analysis

The NRB ruled in *GMP, JO 3-188 Reconsideration Decision* (2016) that the removal and replacement of Pentachlorophenol-treated poles was not a “substantial change” to the preexisting development. On the facts of that case, the NRB found that there was not a cognizable change when existing poles were replaced with in-kind poles. *Id.* at 3.

Poles listed in Fact #1 are not jurisdictional. Retagging poles is not a cognizable change and does not have the potential for significant adverse impacts under the Act 250 Criteria.

After I received the request, I emailed you and asked whether the existing poles would be fully removed, and the new pole placed in the exact same spot, or whether the new pole would be placed next to the existing pole with all or a portion of the existing pole(s) remaining in the ground. You declined to provide an answer to this question. Therefore, I’m obligated to make a determination based on the information that I have. Where you represent that the poles will be “installed in place,” I am interpreting that literally. The existing poles will be removed in their entirety and the new poles will be installed in that exact hole. To the extent that that assumption is true, I conclude that the poles listed under Fact #2 are not jurisdictional according to the reasoning in *GMP, JO 3-188 Reconsideration Decision* (2016).

I emphasize that a jurisdictional opinion is only as good as the facts upon which it relies. *In re: Richard and Elinor Huntley*, DR #419, MOD at 2 n.1 (7/3/03). If the poles will actually be placed adjacent to or otherwise *near* to the existing poles, or in a wholly new location, and any part of the existing poles remains, this analysis will no longer be valid. The NRB’s decision in *GMP, JO 3-188 Reconsideration Decision* (2016) did not consider such facts because those facts were not under consideration in JO 3-188, a decision which I authored. A new analysis would have to be undertaken and I cannot predict the jurisdictional outcome of that analysis.

¹ 10 V.S.A. §6007(c).

² GMP – Royalton, JO 3-171 (2014).

Conclusion

Act 250 jurisdiction doesn't attach to the poles specified in Fact #1 below and does not attach to poles specified in Fact #2 below provided that the existing poles will be removed in their entirety and the new poles will be installed in their exact holes with no portion of the existing poles remaining in the ground.

IV. Reconsideration or Appeal

This is a jurisdictional opinion issued pursuant to 10 V.S.A. § 6007(c) and Act 250 Rule 3(B). Reconsideration requests are governed by Act 250 Rule 3(B) and should be directed to the district coordinator at the above address. Any appeal of this decision must be filed with the Superior Court, Environmental Division (32 Cherry Street, 2nd Floor, Ste. 303, Burlington, VT 05401) within 30 days of the date the decision was issued, pursuant to 10 V.S.A. Chapter 220. The Notice of Appeal must comply with the Vermont Rules for Environmental Court Proceedings (VRECP). The appellant must file with the Notice of Appeal the entry fee required by 32 V.S.A. § 1431 which is \$295.00. The appellant also must serve a copy of the Notice of Appeal on the Natural Resources Board, 10 Baldwin Street, Montpelier, VT 05633-3201, and on other parties in accordance with Rule 5(b)(4)(B) of the Vermont Rules for Environmental Court Proceedings.

Sincerely,



Stephanie Gile

District 2 Coordinator

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